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No. 93-631

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THE PHILADELPHIA ELECTRIC COMPANY, *et al.*,
Petitioners,
v.
HERBERT L. FISCHER, *et al.*,
Respondents.

THE PHILADELPHIA ELECTRIC COMPANY, *et al.*,
Petitioners,
v.
DONALD R. KURZ, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO SUBMIT BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37 of the Rules of this Court, the Equal Employment Advisory Council (EEAC) respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of Philadelphia Electric Company, *et al.*, Petitioners, whose written consent has been provided to the Clerk of the Court.

Counsel for Respondents Herbert L. Fischer, *et al.* and Donald R. Kurz, *et al.*, after being asked, indicated in writing that they "neither refuse nor consent to the filing of an *amicus curiae* brief but instead take no position on this issue." Because all parties have not consented, a motion to file this brief is required.

In support of this motion, EEAC, by the following, shows that its brief brings relevant matter to the attention of this Court that has not been (or will not be) presented by the parties.

1. The Equal Employment Advisory Council ("EEAC" or "Council") is a voluntary association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 280 major U.S. corporations, as well as several associations which themselves have hundreds of corporate members. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

2. All of EEAC's members, and the constituents of its trade association members, are employers subject to various employment and labor laws, including the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.* As employers, virtually all of EEAC's members and member constituencies maintain employee benefits plans, including early retirement incentive programs, over and above normal wages and salaries. These plans either are adopted at the employer's option or are products of collective bargaining with employee representatives.

3. Because of such involvement in ERISA and the ADEA, EEAC members have a substantial interest in the outcome of this case, which addresses the issue of whether an employer must inform its employees of possible new early retirement plans, or of potential changes to existing pension benefit levels, before those plans or changes have been put into effect.

4. Accordingly, the issue presented in the petition is extremely important to EEAC's nationwide constituency. The Third Circuit below held that ERISA requires an employer to inform employees when a new early retirement plan is under "serious consideration." This undefined standard is causing considerable economic and practical problems for EEAC members attempting to implement early retirement incentive programs.

Under this amorphous standard, employers are faced with the possibility of litigating what is and is not "serious consideration." Aware of potential lawsuits, employers will be forced to provide employees with constant updates on the status of highly sensitive, executive-level deliberations and variations on potential early-retirement incentives and pension plan changes that may or may not ever materialize.

In either case, employers face the potential for increased litigation from employees who claim to have relied to their detriment upon the presence or absence of information about possible future plan changes that have not yet been adopted. EEAC's brief explains to the Court that the decision below adopts an unworkable standard that should be rejected by this Court.

5. The Third Circuit's rule is contrary to decisions in several other courts that have held that employers do not have a fiduciary obligation under ERISA to inform employees about changes in non-vested benefit plans until such changes have been adopted. *See e.g., Stanton v. Gulf Oil Corp.*, 792 F.2d 432 (4th Cir. 1986); *Young v. Standard Oil (Indiana)*, 849 F.2d 1039 (7th Cir.),

cert. denied, 488 U.S. 981 (1988); and *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1274 (7th Cir. 1985). Because EEAC's members are large, national employers with operations in many federal judicial circuits, this split of authority is extremely problematic. Employers operating under varying disclosure rules face significant legal risks depending upon where employees are located.

6. Because of its interest in the application of the nation's civil rights laws, EEAC has, since its founding in 1976, filed over 330 briefs as *amicus curiae* in cases before this Court, the United States Circuit Courts of Appeals and various state supreme courts. As part of this *amicus* activity, EEAC has participated as *amicus curiae* in cases involving ERISA preemption of state law.[1] Furthermore, a number of other cases in which EEAC has participated have involved the proper interpretation of ERISA provisions in relation to the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.*[2] In addition, EEAC has briefed a number of other employment issues in this Court.[3]

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[1] *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990); *General Motors Corp. v. Wells*, 881 F.2d 166 (5th Cir. 1989) *cert. denied*, 110 S.Ct. 1959 (1990); *Shaw v. Delta Airlines*, 463 U.S. 85 (1983); *Nolan v. Otis Elevator Co.*, 505 A.2d 580 (N.J. 1986); *Brooklyn Union Gas Co. and American Airlines v. N.Y. Human Rights Appeal Board*, 359 N.E.2d 393 (N.Y. 1976).

[2] *Public Employees Retirement System of Ohio v. Betts*, 109 S. Ct. 2854 (1989); *EEOC v. Westinghouse Electric Corp.*, 869 F.2d 696 (3d Cir.), *vacated and remanded*, 110 S. Ct. 37 (1989), *on remand* 907 F.2d 1354 (3d Cir. 1990); *EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984); *EEOC v. Borden's Inc.*, 724 F.2d 1390 (9th Cir. 1984); *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358 (4th Cir.), *cert. denied* 112 S. Ct. 177 (1991); *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036, *cert. denied* 113 S. Ct. 412 (1992).

[3] *Int'l Bro. of Teamsters v. United States*, 431 U.S. 324 (1977); *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993); and *Harris v. Forklift Systems, Inc.*, No. 91-1168, decided November 9, 1993.

7. EEAC also participated as *amicus curiae* in *Arthur v. Bell Atlantic Corp.*, No. 93-1483 (4th Cir.), argued October 27, 1993. That case raises the same issue as in this case. There, however, the district court applied the Fourth Circuit's *Stanton* decision, cited above, and ruled that there is no fiduciary obligation under ERISA to provide information regarding changes in employee benefit plans until those changes are put into effect.

8. Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of its significant experience in these matters, EEAC is uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case, particularly the practical effect that the decision will have on employers and potential beneficiaries of early retirement benefit plans.

9. EEAC's brief is timely as it is being filed within the time allowed for filing a brief in opposition to the petition. *See* Supreme Court Rule 37.2.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council, respectfully requests that the Court grant it leave to file a brief as *amicus curiae* in this case in support of Petitioners.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE EQAUL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council (EEAC) respectfully submits this brief *amicus curiae*, contingent on the granting of the accompanying motion for leave. The brief supports the petition for a writ of certiorari.

INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus curiae* is set forth fully in the preceding motion.

STATEMENT OF THE CASE

1. *The Underlying Facts.* The respondents are former employees of the Philadelphia Electric Company (PECo). Pet. App. A-22 and A-36.[1] In *Fischer*, PECo was considering the possibility of a costcutting plan that would involve a reduction in the number of employees. Pet. App. A-25. It had hired an outside consultant to develop a long-range strategic plan for cost-reduction. PECo's decision on early retirement modifications would depend, in part, on whether it received an electric utility rate increase from the Public Utility Commission. *Id.*

In *Kurz*, PECo was looking into possible amendments to its pension benefits formula for an existing plan. The employer considered alternative benefit formulas, including surveys comparing PECo's benefits to those of other utility companies. Pet. App. A-37 to A-39.

During this period of uncertainty, respondents made inquiries about whether PECo had any plans to adopt an early retirement incentive program (*Fischer*) or might be planning to increase the level of its early retirement benefits (*Kurz*). PECo's employee benefits counselors responded that they were unaware of any changes being considered and had no knowledge of any new plan. Pet. App. A-34 to A-35 and A-46 to A-47.

Respondents allege that PECo in fact was considering making such changes and that they were not so informed.

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[1] Citations to the Appendix to the Petition for a Writ of Certiorari are noted as Pet. App. ——. The opinions of the Court of Appeals for the Third Circuit below, reported at 994 F.2d 130 and 994 F.2d 136 are reproduced as Pet. App. A-1 to A-20. The unreported opinion of the district court is reproduced as Pet. App. A-21 to A-61.

As a result of the employer's statements, they allege, they accepted benefits that were less than they would have received had they continued working until the new programs were put into effect. Thus, respondents allege that PECo violated its obligations under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* by not informing employees of possible early retirement plans or of possible changes to an existing pension benefits plan. Pet. App. A-48.

2. *The District Court's Decision.* The district court held that ERISA does not require an employer to disclose information on benefit plan changes before the plan or change is put into effect. Pet. App. A-49 to A-50. Specifically, the district court stated:

> It has been held that when an employer acts in the capacity of a corporate decision maker, no fiduciary duties attach. *See Trenton v. Scott Paper Co.*, 832 F.2d 806 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988). Where employers wear two hats, as employers and plan administrators, fiduciary status is only assumed when and to the extent that they function in their capacity as plan administrators. *Payonk v. HMW Industries, Inc.*, 883 F.2d 221, 225 (3d Cir. 1989), *quoting, Amato v. Western Union Intern. Inc.*, 773 F.2d 1402, 1416-17 (2d Cir. 1985).
>
> Nothing in the statutory language of ERISA indicates there is a duty to disclose information on benefits plans before they take effect. *See Payonk*, 883 F.2d at 221; *Trexel v. E.I. DuPont De Nemours & Co.*, No. 85-759 (D. Del. Sept. 9, 1987), aff'd mem. 845 F.2d 1016 (3d Cir. 1988). Courts in other circuits have also held that a duty to disclose information on benefits before they take effect does not exist. *See Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986); *Fine v. Steele*, 699 F.2d 1091, 1094 (11th Cir. 1983); *Fenton Industries v. National Shopmen Pension Fund*, 674 F.2d 1300, 1306 (19th Cir. 1982).

Pet. App. A-49 to A-50. The district court also found that, on the record, there was "no evidence of affirmative material misrepresentations made by any fiduciary or non-fiduciary employee of PECo." Pet. App. A-52. Further, the district court held that the potential changes were not under "serious consideration" until they were presented to the corporation's Board, which had the final authority to implement the changes. Pet. App. A-51.

3. *The Third Circuit's Decision.* The court of appeals below, however, reversed the district court. The Third Circuit adopted the view of the Sixth Circuit that ERISA requires an employer to inform employees when a new early retirement plan is under "serious consideration." *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988); and *Drennan v. General Motors Corp.*, 977 F.2d 246 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 2416 (1993).

The court thus held that a plan administrator may not make affirmative material misrepresentations about possible plan changes. It also stated that a misrepresentation is "material" if there is a "substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision about if and when to retire." Pet. App. A-11 and A-19.

The issue before the Court is whether an employer has a fiduciary responsibility under ERISA to communicate with its employees regarding a possible business decision to change a benefit plan either before that plan is put into effect, or at least before the change has been presented to the employer's Board of Directors or other entity with final authority to implement the changes.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The court below adopted the improper view of the Sixth Circuit that ERISA requires an employer to inform employees when a new early retirement plan is under "serious consideration." *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988); and *Drennan v. General Motors Corp.*, 977 F.2d 246 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 2416 (1993). These cases hold that when an employer "seriously considers" a possible future benefits plan, that employer has a fiduciary duty to disclose "the progress of its serious deliberations to make the plan available." The decisions of the Sixth Circuit are contrary to decisions in several other courts, which hold for example, that "it is not a violation of ERISA to fail to furnish information regarding amendments before those amendments are put into effect." *Stanton v. Gulf Oil Corp.*, 792 F.2d 432 (4th Cir. 1986). The decision below is causing extreme confusion for employers' benefits' counsel and officers responsible for employee benefit plans.

Additionally, the "serious consideration" rule is impractical and impossible to apply. It places employers in the dilemma of being sued if they do not adopt preliminary plans they were considering, and also of being sued if they withhold information from employees who may retire while final decisions are being made. Indeed, the typical plan goes through many drafts before final adoption or rejection. Premature disclosure could lock employers into ill-conceived plans or gull employees into accepting early retirement based on possible benefits that are not forthcoming.

REASONS FOR GRANTING THE WRIT

BY REQUIRING EMPLOYERS TO DISCLOSE WHENEVER CHANGES IN BENEFIT PLANS ARE UNDER "SERIOUS CONSIDERATION," THE COURT OF APPEALS ADOPTED AN UNWORKABLE STANDARD THAT IS CAUSING EGREGIOUS ECONOMIC AND PRACTICAL PROBLEMS FOR EMPLOYERS, PARTICULARLY THOSE WHO ALSO OPERATE IN CIRCUITS WHOSE DECISIONS HAVE REJECTED THE "SERIOUS CONSIDERATION" STANDARD.

The Third Circuit's decision requires employers to disclose changes in benefit plans before those changes have been adopted, when they are only under "serious consideration." The Third Circuit began its analysis by stating correctly, that "[a]s an employer, neither PECo nor its business decision to offer an early retirement program were subject to ERISA's fiduciary duties. *See e.g., Payonk v. HMW Indus., Inc.*, 883 F.2d 221, 225 (3d Cir. 1989)." Pet. App. A-6. Relying on this principle, the district court below dismissed the suit because the benefits decisions involved in this case were business decisions that did not implicate ERISA' fiduciary obligations.

The Third Circuit, however, then went astray by embracing the approach of the Sixth Circuit that confuses the employer's business decisions with its fiduciary obligations. *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154 (6th Cir. 1988); and *Drennan v. General Motors Corp.*, 977 F.2d 246 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 2416 (1993). Those decisions state that if an employee asks about possible changes in early retirement plans, the employer must "disclose[] the progress of its serious considerations to make a plan available to affected employees. *Berlin*, 858 F.2d at 1164." *Drennan*, 977 F.2d at 251.

As now shown, the decision below conflicts with other court holdings and misinterprets ERISA. Further, the "serious consideration" approach is causing practical problems for employers attempting to balance the need to

consider various benefit options with the strong likelihood of being sued by employees who make decisions based upon information whose status is very likely to change before a final corporate decision is made.

A. Requiring Employers to Disclose the Possible Creation of a Proposed Benefit Plan Before that Plan is Implemented Imposes Egregious Economic and Practical Problems on Employers.

As noted, the decision below imposes on employers a fiduciary duty to disclose the possible creation of a proposed benefit plan before that plan is implemented and before there is any certainty that it ever will be adopted. This decision is creating egregious economic and practical problems on employers. Indeed, the Third and Sixth Circuit decisions have been subjected to unremitting criticism from benefits counsel and officers because of the practical and legal problems they have created.

1. *The "Serious Consideration" Test is Not Susceptible to a Workable Definition. Moreover, Employers Who Follow the Decision Below Face The Likelihood Of Being Sued Based Upon Information Disclosed Prior To The Plan's Final Adoption.*

The decision below purportedly would require disclosure only when the decision whether to adopt a new plan or modify an existing one is under "serious consideration." This formulation, however, is extremely broad and could encompass any internal discussion that could lead to a change in benefit plans. In reality, the rule will require employers to disclose the mere possibility of a new plan or a changed plan.

"Serious consideration" is not susceptible to a fixed definition, and there is not a standard under which an employer could determine when the requirement would mandate disclosure. Thus, because significant liability

may attach, cautious employers might feel compelled to disclose any suggestion that an employee benefit plan be modified.

However, as we show below, premature disclosure before a plan is finally adopted may not resolve the problems facing employers and employees, but rather increase them. Employers who consider proposals to create new benefit plans will be faced with an impossible choice: they can disclose their internal deliberations and risk liability if the plan is not adopted, or they can delay announcement of the plan until the formal plan is adopted and face liability, as in this case.

This impossible burden can be resolved by reversing the decision below and holding that an employer who is considering the business decision of whether to change a benefit plan does not have a fiduciary obligation to disclose the change until it is adopted.

2. *The Third Circuit's Decision is Out of Touch with How Plans Actually Are Adopted by Major Employers. Typically, There Is No "Plan" Until The End of a Complicated Decision Making Process With Many Entities Having Input Into the Discussions.*

It would be naive, at best, to think that when employers are considering early retirement incentive plans, there usually is some "plan" that is sitting on the shelf waiting to be announced. In the typical situation, many different decision makers will be involved in a complicated "process" in which many alternatives and options will be discussed, modified, rejected, or adopted.

Many companies establish their post-employment retirement and severance policies in response to unforeseen but ongoing economic exigencies. Indeed, early retirement plans often are offered in the face of business difficulties and economic uncertainty. Economic circumstances and employees' reactions to employer policies, often make it

difficult to predict, much less guarantee, what these extra benefit packages will look like. Economic decisions may be made in series over time, and often it is impossible for employers to predict economic conditions over several months, much less over several years.

When an employer decides to downsize, it has to predict how many employees it ultimately will need, as well as how many eligible employees or retirees will opt to take an early retirement offering. If the plan is too generous, it may be oversubscribed and the employer may have to hire new employees or rehire those who chose to retire under the plan. On the other hand, it is possible that not enough employees will subscribe to the plan, and a subsequent early retirement offering may be required.

In this time period, economic conditions may change and previous assumptions about work force needs and the amount of funds available for retirement incentives may need to be modified, particularly when the employer begins to learn how many and which employees have opted into the first early retirement offering. Thus, employers have to balance these realities and often are unable to settle on the terms of a second offering until the first has run its course.

In addition to economic uncertainties, it would be extremely difficult to pinpoint any particular decision maker who could speak authoritatively on whether a plan will be offered, or what it would contain. For example, participants in these discussions typically include benefits experts, labor and benefits counsel, human relations specialists, plant managers, line managers, actuaries, outside consultants and ultimately, the company's management committee and Board of Directors.

These entities will have to balance and consider multiple changing factors such as predicted headcount, benefit costs, and the availability of present assets for lump sum payments versus payments over time. Along the way,

various options will be proposed, examined, revised, rejected, or possibly reinstated or accepted with modifications.

During this period, the available information will be spread out among several individuals and departments and often it would be extremely difficult to give complete, accurate information on the status of the plan being considered. Indeed, during this period there may be substantial internal negotiations regarding the terms of any potential offering.

Coupled with these internal practical and economic problems, unionized employers, such as in *Drennan*, will have to negotiate with the union before announcing any new benefits. The union, of course, serves many constituencies and will have its own members' interests to balance, particularly those of its remaining incumbent members and the benefits to be received by potential retirees. Indeed, some employers have had to face lawsuits from unions and cities challenging the employer's decision to close or downsize a plant. As a result, the size and shape of an early retirement package can be changing constantly.

In addition, recent amendments to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* have raised potential new legal liabilities regarding early retirement enhancements, severance pay offsets for retirement eligible individuals and information disclosure regarding eligible employees. See Titles I and II of the Older Workers Benefit Protection Act, Public Law 101-433, 101st Congress, October 16, 1990, 104 Stat. 978, 29 U.S.C. § 624(f) and (l).

Particular ADEA concern must be given to the retiree health benefit and the early retirement incentive offsets to severance pay. The 1990 amendments require careful actuarial calculations so that retirees receive the full amount due them in severance pay *plus* existing retire-

ment benefits under the ADEA's requirements. Typically, the employers' labor counsel spend extensive time with the employers' benefits experts analyzing the costs of proposed benefits alternatives when considered in light of the requirements of the ADEA and ERISA.

In all of these examples, an early retirement offering may be under "serious consideration." But in most of these examples it would be an extreme hardship to require an employer to disclose the possibility in terms of the potential plan until it is finally adopted. For these reasons, the "serious consideration" rule is completely impractical.

3. *The Policy Underlying the Fiduciary Duty of Disclosure Would be Retarded, Not Advanced, by Requiring Premature Disclosure Before a Plan is Put Into Effect.*

The policy underlying the fiduciary duty of disclosure—to ensure that beneficiaries make informed and rational decisions—would be retarded, not advanced, by requiring premature disclosure before a plan is put into effect. Many, indeed most, proposals that are eventually adopted evolve as they are developed so that their ultimate form is likely to be substantially different from the one that is "seriously considered" in a preliminary version.

Under the "serious consideration" approach, therefore, employees who act upon a preliminary version of a plan may find that its terms have changed and their expectations have been thwarted. Indeed, requiring disclosure of plans that are under "serious consideration" would be an impossible burden on employers and a disservice for potential beneficiaries.

The Third Circuit's approach shows a lack of understanding of employee benefits practices and many factors that come into play in adopting an early retirement plan. First, it should be noted that early retirement incentive plans are not vested, and thus the employer has broad dis-

cretion in the benefits it offers. Such plans go beyond any legally-required benefit and provide an extra post-retirement flow of income to eligible employees. Indeed, even with existing plans, an employer may change, restrict or withdraw entirely an existing plan, subject only to guarantees in the plan. *Young v. Standard Oil (Indiana)*, 849 F.2d 1039, 1045 (7th Cir.), *cert. denied*, 488 U.S. 981 (1988).

It is evident that the courts adopting the "serious consideration" test have not considered the harm that this amorphous standard could cause to potential beneficiaries. In almost all instances when an early retirement plan is offered, it is a nonmandatory plan intended to assist departing workers after they leave the company. Under the Third Circuit's rule, however, many of these systems could be jeopardized.

Employers would be encouraged either to eliminate early retirement plans altogether, or to cut their liability by reducing the benefit levels in plans offered at a later time. Indeed, several EEAC members have informed us that the decisions below have had precisely this effect.

The problems created by the approach of the Third and Sixth Circuits were summarized succinctly by the district court in *Arthur v. Bell Atlantic*, No. 3-93-CV-854 (E.D. Va. filed Mar. 18, 1993) at 5:

> Employees undoubtedly benefit when their employers upgrade severance packages and implement more generous pension benefit plans for their workers. Recognition of plaintiffs' cause of action would have a chilling effect on such activities, as employers would be frightened even to put proposed new packages on the drawing board for fear that they might get sued for failing to disclose plans that are not yet, and may never be, formally adopted.

Thus, the decision below could well have the effect of depressing the overall availability of retirement benefits and discouraging employers from even considering a benefit plan that is more generous than an earlier plan.

B. The Decision Below Directly Contradicts Decisions by Other Circuits, Causing Great Confusion, Particularly for Employers With Operations In More Than One Circuit.

The decision below cannot be reconciled with the decisions of other courts that have rejected similar claims under ERISA. Numerous other courts have held that changes in plans need not be disclosed until they become effective. The Fourth and Seventh Circuits, for example, have held that employers have no fiduciary duty under ERISA to disclose their intentions until the terms of the plan are put into effect. *Stanton v. Gulf Oil Corp.*, 792 F.2d 432 (4th Cir. 1986); and *Young v. Standard Oil (Indiana)*, 849 F.2d 1039 (7th Cir.), *cert. denied*, 448 U.S. 981 (1988).

In *Stanton*, the plaintiff chose to retire early and receive benefits under an existing severance plan. Shortly before the plaintiff retired, Gulf considered and approved a new employee welfare plan providing for enhanced severance benefits. The new plan was instituted on the same day that the plaintiff retired.

Before accepting his plan, Stanton specifically asked Gulf representatives whether a more attractive plan was in the works. Gulf representatives did not inform him that the new (and more attractive) plan had been approved. The plaintiff sued, claiming that he was entitled to the benefits of the new plan because Gulf had violated its fiduciary duty under ERISA by not disclosing its consideration of that plan. 792 F.2d at 433.

The court rejected the plaintiff's claim and held that the fiduciary duties that arise under ERISA are owed only to "participants" in an ERISA plan, and that an employee is not a "participant" in an ERISA plan until the terms actually are adopted in the plan.

> Although ERISA does mandate fiduciary duties with respect to employee benefits plans, such duties are solely with respect to participants. The duties do

> not begin until the terms at issue are incorporated into a plan.

Id. at 435.

Additionally, the court noted that the statements made to Stanton by Gulf representatives did not constitute "misrepresentations," because all that Stanton had asked for was information "about the possibility of changes which could be made" at some future point. *Id.* The court held that Gulf was under no duty to disclose such a possibility, stating that:

> It is not a violation of ERISA to fail to furnish information regarding amendments before those amendments are put into effect . . . . This is so because the legislative intent of ERISA was not to assure the sanctity of early retirement expectations, but to safeguard accrued retirement benefits.

Id.

In *Young v. Standard Oil*, the Seventh Circuit drew the proper distinction between a business decision and "*administering* a benefit plan . . . ." 849 F.2d at 1044 (emphasis in the original). The court agreed with the employer's arguments that "there is no fiduciary duty in implementing, altering or abolishing a benefit plan involving nonvested benefits;" and that "defendants were free to create the special F&P severance plan *without notice* to the plaintiffs." *Id.* (emphasis added).

The Seventh Circuit held that an employer may amend a nonvested severance plan "without violating ERISA." 849 F.2d at 1045. The Seventh Circuit recognized that a duty to disclose deliberations about plan changes did not arise "just because Amoco administered its employees' severance plan." *Id.* Indeed, the court stated unequivocally that "Amoco owed no legal duty to reveal that it intended to create a special severance plan for the divestiture of the F&P Division." *Id.*

The Seventh Circuit came out the same way in a unionized setting, thus taking a position directly at odds

with the Sixth Circuit's *Drennan* decision. In *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1274, 1280 (7th Cir. 1985), the court rejected the plaintiffs' ERISA claims that the employer and union were fiduciaries with respect to negotiated changes in the airline pilots' benefit plans. The Court stated:

> neither a union nor an employer is an ERISA "fiduciary while, or merely because, it is negotiating the terms and conditions of future pension benefits, at least where these benefits are not protected under ERISA's vesting and nonforfeitability provisions." Citing *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262, 1268 (7th Cir. 1985).

The court, therefore, concluded that United was not a fiduciary because of its status as a negotiator over the terms of the plan and "could not have breached any fiduciary duties with respect to the terms of the plan *until those terms were incorporated into the plan at the conclusion of negotiations.*" 756 F.2d at 1280 (emphasis added).

Other decisions also conflict with the decision below. *See Barnes v. Lacy*, 927 F.2d 539, 543-44 (11th Cir. 1991) (court refused to adopt the position that an employer had "a duty to announce its intention to reserve the right" to make changes to existing plans or to offer new ones), *cert. denied*, 112 S. Ct. 372 (1991); *Payonk v. HMW Industries, Inc.*, 883 F.2d 221, 224-6 (3d Cir. 1989) (there is no duty to disclose preliminary termination discussions until a final decision is made); cf. *Porto v. Armco, Inc.*, 825 F.2d 1274, 1276 (8th Cir. 1987) (per curiam) (rejects the argument that fiduciary has the duty to disclose plan changes prior to the notification mandated by ERISA's disclosure provisions), *cert. denied*, 485 U.S. 937 (1988); *Trexel v. E.I. du Pont de Nemours & Co.*, No. 85-759 (D. Del. Sept. 9, 1987), aff'd mem. 845 F.2d 1016 (3d Cir. 1988) (court held employer had no obligation under ERISA to provide the plaintiff with information on an upcoming benefit plan

before the plan was put into effect); and *Sleichter v. Monsanto Co.*, 612 F. Supp. 856 (E.D. Mo. 1985) (holding that ERISA did not require disclosure of an early retirement program in its formative stages even though plaintiff inquired).

These decisions are in direct conflict with the position of the Third and Sixth Circuits, which require an employer to "fairly disclose[] the progress of its serious considerations to make a plan available to affected employees." *Drennan*, 977 F.2d at 251.

To make matters worse, the Third and Sixth Circuit decisions are so disingenuous that they are internally inconsistent. On one hand, for example, the decision below cites *Drennan* for the proposition that its holding "'does not require the fiduciary to disclose its internal deliberations nor interfere with the substantive aspects of the collective bargaining processes.'" Pet. App. A-10. On the other hand, *Drennan* states that an employer must "fairly disclose[] the progress of its serious considerations." 977 F.2d at 251. There is no way, however, that an employer can "disclose the progress of its serious considerations" (*Drennan*) without "disclosing its internal deliberations" (*Fischer*). This sleight of hand may be necessary so that these courts can mask the confusion they have generated, but such inconsistency creates unworkable and oppressive public policy.

Because of these conflicting approaches, employers in different circuits find themselves under different obligations with respect to disclosing information about potential benefit plans. EEAC's members thus urge the Court to grant the petition, reverse the decision below, and hold that an employer's fiduciary obligation to disclose information about benefit plans does not commence until a plan is adopted.

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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